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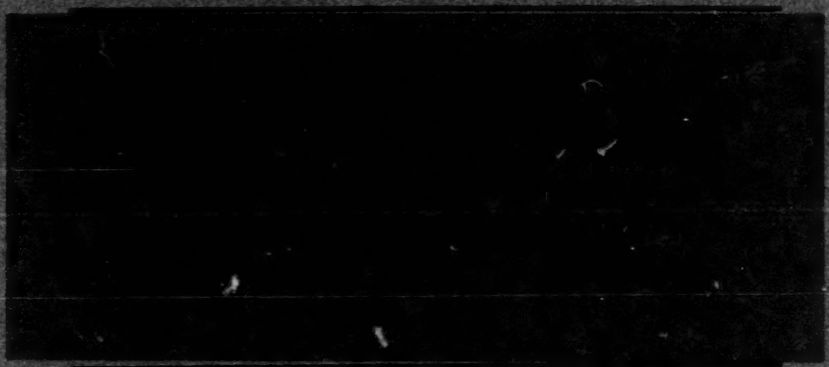
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1389



PETITION FOR WRIT OF CERTIORARI

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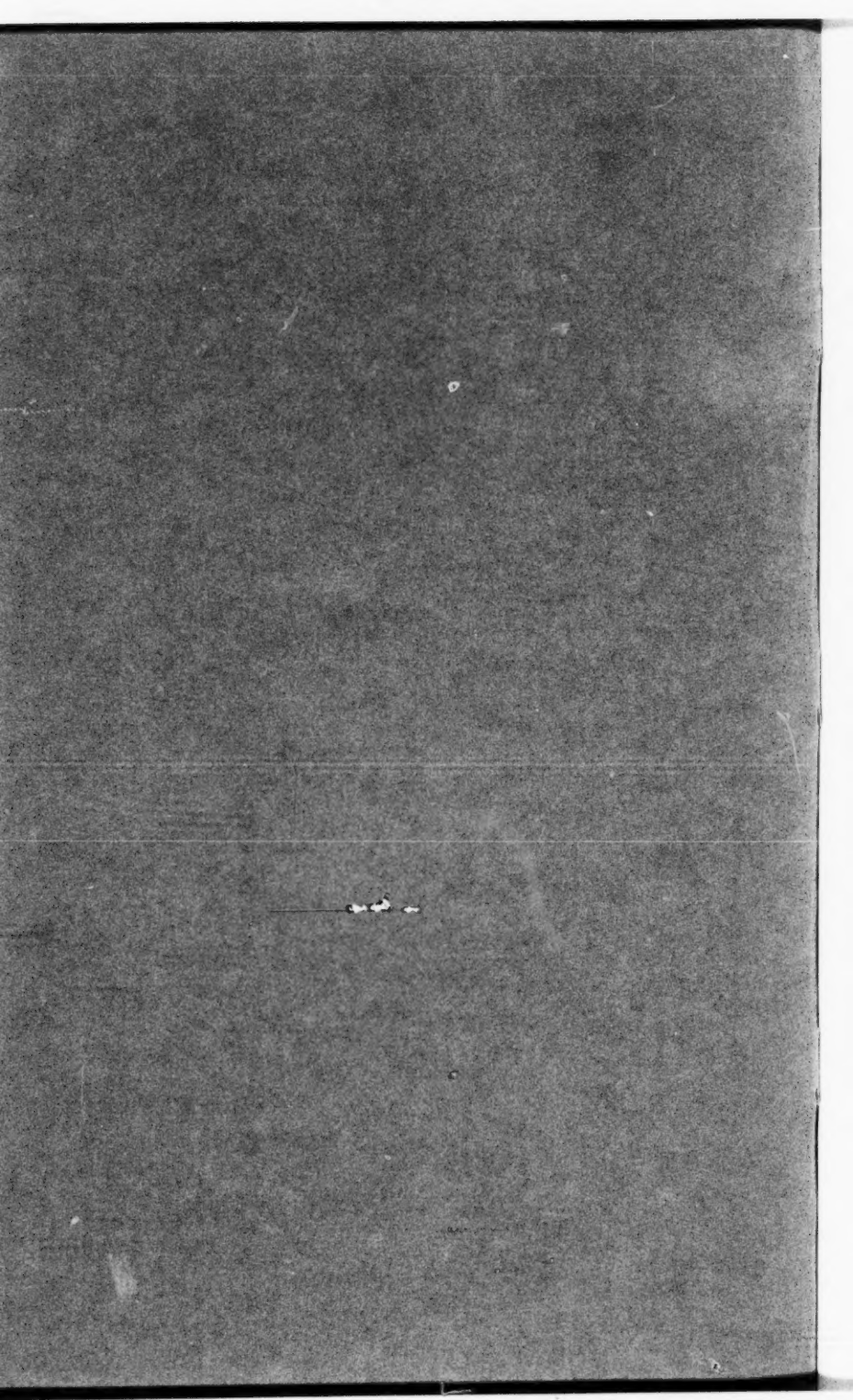

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

UNITED STATES OF AMERICA, Libellant, vs. **MISCELLANEOUS FIREARMS,** Libellee, **APPEAL OF LLOYD K. FINFROCK,** Libellee.	Petition for Writ of Certiorari From The United States Court of Appeals For the Seventh Circuit No. 75-1687

PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS

No decisions rendered in this case have been reported. District Court Order of forfeiture dated December 26, 1974 and Order denying post trial motion dated June 13, 1975 are appended (App. A-1 through B-1). U.S. Court of Appeals, Seventh Circuit, Order of February 3, 1976, unpublished not to be cited, affirming the District Court decision, and its order denying petition for rehearing, dated February 27, 1976, are appended (App. C-1 through D-1).

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GROUNDS OF JURISDICTION

Petitioner seeks Writ of Certiorari to review Court of Appeals, Seventh Circuit, order dated February 3, 1976, affirming judgment of United States District Court of Illinois, Southern Division, ordering the forfeiture of petitioner's collection of 23 rare guns valued at $10,000.00.

A petition for rehearing was filed with the Court of Appeals within the time limitations. Said petition for rehearing was denied on February 27, 1976.

Jurisdiction to entertain this petition is conferred by 28 U.S.C. §1254(1). As heretofore set out, review is sought because the Court of Appeals decision is in conflict with the decisions of other Federal Court of Appeals; is in conflict with decisions of the United States Supreme Court; and has decided important questions of federal law as to what activities of a gun collecting hobbiest constitutes a violation of the Gun Control Act of 1968 and ordering the entire gun collection forfeited without evidence showing the guns were possessed in violation of the Statute, which questions have not, but should be settled by this court.

QUESTIONS PRESENTED FOR REVIEW

1. Is the government required to establish by a preponderance of the evidence that a particular gun, the possession of which is not contraband per se, was used or intended to be used in violation of the Gun Control Act before a valid order of forfeiture can be entered?

2. Is the government required to establish by a preponderance of the evidence sales of guns at wholesale or retail prerequisite to a valid finding that a person is dealing in firearms without a license under the Gun Control Act of 1968?

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3. Is the government, where it dismisses the criminal indictment charging the offense upon which forfeiture of weapons is based, collaterally estopped from seeking forfeiture of weapons based upon said dismissed charge under the Fifth Amendment to the United States Constitution?

CONSTITUTION AND STATUTE PROVISIONS

AMENDMENT [V.] UNITED STATES CONSTITUTION:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18 U.S.C. §921(a)(11):

> The term 'dealer' means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term 'licensed dealer' means any dealer who is licensed under the provisions of this chapter.

TITLE 18 U.S.C. §921(a)(13):

> The term 'collector' means any person who acquires, holds, or disposes of firearms or ammunition as curios, or relics, as the Secretary shall be regulation define, and the term 'licensed collector' means any such person licensed under the provisions of this chapter.

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TITLE 18 U.S.C. §922(a)(1):

> It shall be unlawful for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

TITLE 18 U.S.C. §924(d):

> Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in Section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

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STATEMENT OF CASE

Lloyd K. Finfrock's collection of 23 guns, primarily rare, old German Lugar pistols, seized by the government on July 24, 1971, under a general search warrant, were ordered forfeited by the District Court.

An indictment charging Mr. Finfrock with violating Title 18 U.S.C. §922(a)(1) which was returned on August 14, 1971, was dismissed by the government nearly three years later on June 17, 1974, without notice to Mr. Finfrock and for no reason made of record. When Mr. Finfrock sought the return of his property, the government filed a forfeiture complaint under Title 18 U.S.C. §924(d) on July 9, 1974.

The government's case resulted from contacts made by Ron Backer, a licensed gun dealer seeking to redeem himself from some violation of the statute. Although Mr. Backer made all contacts involved herein with Mr. Finfrock, the government did not call Mr. Backer because they could not vouch for his veracity. A.T.F. Agent Borcia testified that in the presence of Backer and himself on December 22, 1970, Mr. Finfrock sold one gun and offered to sell four others; that on February 19, 1971, in the presence of the same persons, Mr. Finfrock offered to sell four guns and stated that he had obtained ten .25 caliber pistols from a dealer in Decatur and was able to sell them for a pretty good buck. Agent Borcia made no effort to determine if the statement was true and could not identify any of the seized weapons as being offered for sale. A.T.F. Agent Krug testified of a meeting at Mr. Finfrock's residence on July 20, 1971, with Ron Backer, Sandra Coe and Mr. Finfrock. Krug said Mr. Finfrock offered to sell five guns but could not identify any of the

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seized weapons as being offered for sale. Neither Agent saw more weapons than he claimed were offered for sale.

Mr. Santarelli, roommate of Mr. Finfrock from August, 1970 until May, 1971, testified that he knew Mr. Finfrock was a lugar gun collector but had no knowledge that Mr. Finfrock was involved in selling guns; further, that he and to his knowledge no other person had ever seen Mr. Finfrock's collection of guns at one time.

Sandra Coe, who was present on July 20, 1971, said that Lloyd Finfrock made no offer to sell any weapons to either man on that date. She said Mr. Finfrock was asked if he had any firearms for sale; although upon urging from the men present, Mr. Finfrock showed five or six guns to them, and was asked what he thought was their value.

Mr. Finfrock testified that he was an insurance salesman for Lincoln National Insurance Company, and enjoyed the hobby of making wood cabinets and collecting rare firearms, particularly German Lugars. He identified all 23 weapons seized as his gun collection which took him three years to assemble. He stated that lugars were classified as curios or relics in Exhibit 1 by the Secretary of the Treasury. In his opinion, the value of the 23 seized weapons was $10,000.00. Further, he testified that he met Ron Backer at a gun show in Peoria, and knew him to be a licensed dealer. Mr. Backer bought the gun from him on December 20, 1970, by pre-arrangement. That Mr. Backer called to meet him on February 19, 1971, and July 20, 1971, for no apparent reason. Mr. Finfrock denied offering to sell any weapons to Mr. Backer, Mr. Borcia or Mr. Krug, on the dates in question.

The District Court's order of forfeiture failed to men-

tion the conflict in testimony; failed to recognize the uncontradicted evidence of the defense, and failed to assert any relation between the possession of the 23 weapons and any violation of the Gun Control Act by Mr. Finfrock.

ARGUMENT

1. Is the government required to establish by a preponderance of the evidence that a particular gun, the possession of which is not contraband per se, was used or intended to be used in violation of the Gun Control Act before a valid order of forfeiture can be entered?

United States v. One Ford Coach, 307 U.S. 219, 83 L. Ed. 1249, 59 S. Ct. 861 (1939), this Supreme Court stated at page 236:

> "The forfeiture acts are exceedingly drastic. They were intended for protection of the revenues, not to punish without fault."

The evidence upon which the government relies for a valid forfeiture order fails to establish a fault relationship between the possessor and the property. At most, the government has shown possession of the 23 weapons by Mr. Finfrock at a time when he was not a licensed gun dealer. Without any evidence to prove any particular gun was offered for sale as a violation of the statute, the government must rely upon presumption of illegality to support the forfeiture. Is evidence of possession of a weapon by a non-licensed dealer without evidence relating said possession to a violation of the law sufficient to justify a forfeiture under the Gun Control Act of 1968? This forfeiture is predicated upon the affirmative to that question.

To the contrary is the following authority:

United States v. One Ford Coach, supra (forfeitures are not intended to punish without fault); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 14 L. Ed. (2d) 170, 85 S. Ct. 1246 (1965) (distinguishing between contraband per se and only derivative contraband); *United States v.*

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United States Coin and Currency, 401 U.S. 715, 28 L. Ed. (2d) 434, 91 S. Ct. 1041 (1971) (recognizes requirement for the owner of property to have been using it in a criminal activity for valid forfeiture order); and *Huddelston v. United States,* 415 U.S. 814, 39 L. Ed. (2d) 782, 94 S. Ct. 1262 (1974) (Weapons may be forfeited where they are in violation of the statute).

In conflict with the Seventh Circuit Court of Appeals is the decision of *Lowther v. United States,* 480 F. (2d) 1031 (CA10, 1973), which held that the government must relate possession of a weapon with a violation of the statute to support a valid forfeiture order.

District Court decisions are in conflict with the Seventh Circuit. In the *United States v. 1,922 Assorted Firearms, et al.,* 330 F. Supp. 635 (E.D. MO. E.D. 1971), the District Court denied the government's requested forfeiture of the weapons because the government failed to relate possession of the weapons with a violation of the statute, denying that possession establishes intent to violate the law. That court distinguished the case of *United States v. One Assortment of 12 Rifles and 21 Handguns,* 313 F. Supp. 641 (N.D. Fla. 1970), where the weapons seized were openly displayed in view of the prospective buyer.

Even the Supreme Court of Illinois requires evidence of fault, or something more than mere possession to support forfeiture of private property. Note: *1957 Chevrolet v. Division of Narcotic Control,* 27 Ill. (2d) 429, 189 N.E. (2d) 347 (1963); and *Boling v. Division of Narcotic Control,* 24 Ill. (2d) 305, 181 N.E. (2d) 147 (1962).

The government failed to demonstrate how possession of the 23 weapons by Mr. Finfrock is in violation of the law. Continuing, the government has failed to establish a valid forfeiture order as to 10 of the weapons, including two

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rifles no evidence of any transaction or intended transaction involving rifles have been adduced by the government. Giving the best inference to the evidence for the government, the most shown has been an offer, and only an offer, to sell 13 weapons. How can the government justify more than that?

At the heart of the matter is the extent to which a hobbyist may go on collecting guns. There is no conflict in the evidence that the seized weapons are collectors items and that Mr. Finfrock was a collector. Under the Seventh Circuit decision in this case, not even lip service has been given the right of a citizen to collect weapons. Any collector must buy and sell weapons in order to acquire the collection. All collectors run the risk of being declared in the business of dealing in firearms without a license and forfeiting all of their collection to the government.

The conflict existing with the Seventh Circuit's decision here and decisions of this Supreme Court mentioned above, the conflict with the Tenth Circuit Decision mentioned, and the need for this court to decide the important question of taking private property, without fault establish appropriate basis for a Writ of Certiorari to issue in this case.

2. Is the government required to establish by a preponderance of the evidence sales of guns at wholesale or retail prerequisite to a valid finding that a person is dealing in firearms without a license under the Gun Control Act of 1968?

Forfeiture of weapons is predicated upon a finding that Mr. Finfrock was engaged in the business of dealing in firearms without a license.

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The statutory definition of dealer is found in 18 U.S.C. §921(a)(11) as:

> "Any person engaged in the business of *selling* firearms or ammunition at *wholesale or retail*. . . ." (Emphasis Added).

Dealing in firearms has been defined by the Seventh Circuit Court of Appeals in *United States v. Gross*, 451 F. (2d) 1355 (1971) as:

> ". . . one that is engaged in any business of selling, repairing or pawning firearms and that business is that which occupies the time, attention and labor of the man for the purpose of livelihood or profit."

The statute speaks of selling at wholesale or retail as the criminal act. Case law speaks of selling for profit or livelihood. Obviously, then, such is an element of proof by the government before there can be a valid finding of being an unlicensed dealer. Statements of offer are not included for evidence of violating the statute.

The government completely failed to establish the wholesale or retail price or profit involved in either sales or offers to sell. Actually, only one sale of a firearm on December 20, 1970, was established by the government. All other evidence relating to dealing had to do with statements of Mr. Finfrock. Whether a statement is an offer is not relevant to establish an unlicensed dealer because the statute and case law requires evidence of sales. Testimony by Agent Borcia of the statement of Mr. Finfrock on February 19, 1971, is merely evidence that Mr. Finfrock made the statement. Surely, hearsay is not evidence of the fact other than the statement was made. The government could have obtained evidence and determined whether Mr. Finfrock sold one or more .25 caliber pistols, but instead, the government offered merely evidence of a statement. Admitting or denying that the

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statement was made does not establish evidence of sales of weapons. It is interesting to note the reliance made upon Mr. Finfrock's conversation of February 19, 1971, and the utter silence as to Mr. Finfrock's testimony under oath, including, that evidence uncontested.

So far as petitioner is aware, all federal court decisions upholding criminal convictions for dealing without a license have been supported with evidence of several sales of firearms for profit or above market price. Note the following: *United States v. Gross, supra* (eleven sales in two months in excess of market price); *United States v. Huffman*, 518 F. (2d) 80 (CA4, 1975) (twelve sales within a few months); *United States v. Day*, 476 F. (2d) 562 (CA6, 1973) (five sales in two months); *United States v. Wilkening*, 485 F. (2d) 234 (CA8, 1973) (Twenty sales in seventeen months for $350.00 profit); *United States v. Stone*, 513 F. (2d) 1449 (CA8, 1975) (Six sales within few months for livelihood).

Evidence establishing all elements of the offense must be strictly followed in this case because forfeiture of private property hinges upon the result. The indictment charging the offense by Mr. Finfrock was dismissed by the government, thereby eliminating the burden of proving him guilty beyond a reasonable doubt. Did that dismissal also excuse the government from proving his guilt of all elements, and establish a presumption of Mr. Finfrock's guilt because he sold one gun to a licensed dealer?

Not only is Mr. Finfrock facing the loss of his property, which may appear small to this court, but all hobbyists collecting firearms face the same confrontation with the government. The lower courts have deviated so far from the accepted and usual standard in judicial proceedings in this case to require the United States Supreme Court

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to exercise its power of supervision, ordering the forfeiture to be set aside.

3. Is the government, where it dismisses the criminal indictment charging the offense upon which forfeiture of weapons is based, collaterally estopped from seeking forfeiture of weapons based upon said dismissed charge under the Fifth Amendment to the United States Constitution?

Seventh Circuit would have you to believe that forfeiture of private property, possession of which is unrelated to a violation of the law, not contraband per se, under circumstances where the government has dismissed the indictment with authority to re-indict, is a remedial sanction of the law. Such a position far exceeds the present statute of the law of forfeiture, and the Seventh Circuit's decision conflicts therewith.

Forfeitures are criminal in nature in cases where the forfeiture can be had only upon a determination that the criminal law has been violated. *United States v. United States Coin and Currency,* 401 U.S. 715, 28 L. Ed. (2d) 434, 91 S. Ct. 1041 (1971); *Boyd v. United States,* 116 U.S. 616 (1886); *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 14 L. Ed. (2d) 170, 85 S. Ct. 1246 (1965); *Lowther v. United States,* 480 F. (2d) 1031 (CA10, 1973); and *McKeehan v. United States,* 438 F. (2d) 739 (CA6, 1971).

True, some forfeitures are remedial and civil in nature. In those cases, the property subject to forfeiture is contraband per se, or dependent upon facts than a determination of violating a criminal statute. For example, in *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 34 L. Ed. (2d) 438, 93 S. Ct. 489 (1972) cited by the Seventh Circuit, involved forfeiture of jewels brought into this country without declaring them to customs, and was

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not based upon a finding that the criminal statute had been violated. In that case at page 237, footnote 8, this court specifically noted the differences between penal or criminal forfeiture, and remedial or civil forfeiture.

Of course, where the forfeiture is criminal, the protection of the fifth amendment to the United States Constitution applies. In a criminal forfeiture, where the criminal charge has been decided against the government, collateral estoppel would bar forfeiture under the same criminal act, including dismissal of the criminal charge by the government. *McKeehan v. United States,* supra; *Lowther v. United States,* supra; *United States v. United States Coin and Currency,* supra; and *One Lot Emerald Cut Stones v. United States,* supra.

Mr. Finfrock first was faced with the conviction of a criminal offense, after three years, and without notice, the criminal charge was dismissed, but done in such a way that the government could file the same charges again within the statute of limitations. Title 18, U.S.C., Federal Rules of Criminal Procedure Rule 48(a). When Mr. Finfrock asked for the return of his property, the government decided to file a complaint for forfeiture. It was not until the forfeiture hearing that Mr. Finfrock learned the government dismissed the indictment because of its inability to vouch for the veracity of their material witness, Ron Backer. Throughout the forfeiture hearing, Mr. Finfrock was hindered by fear of saying something which would trigger the government into filing the same criminal charge.

Mr. Finfrock is about to lose an investment in a hobby valued at $10,000.00, upon evidence of one sale of a legal collector's item to a federally licensed gun dealer where there is no evidence that his possession of the weapons

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was illegal. Resoundingly, the taking of such property by the government constitutes a criminal sanction. If collateral estoppel and the fifth amendment does not prohibit the government from "having its cake and eating it too", then for private citizens, otherwise not involved in criminal enterprise, face loss of great wealth to the government under the forfeiture statute.

Respectfully, petitioner requests this court to issue Writ of Certiorari, to conform the decision in this case with prior decisions of this court and the court of appeals in other circuits, mentioned hereinabove.

CONCLUSION

Conflict with decisions of this court and other courts of appeals justifies the discretionary Writ of Certiorari. Collateral estoppel and the safeguards under the fifth amendment speak more loudly for this court to intervene herein. But the government's taking of private property without showing fault, so far exceeds the standard of justice expected in this land, to call for the exercise of the Supreme Court's power of supervision by issuing a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Libellant,
v.
MISCELLANEOUS FIREARMS,
Libellee.

S-Civ-74-83

MEMORANDUM OPINION AND ORDER

The above entitled cause came on regularly for trial before the Court and the Court having considered the evidence and arguments of counsel, finds and orders as follows:

FINDINGS OF FACT

1. This Court has jurisdiction under the provisions of 28 USC Sec. 1345 and Sec. 1355 and 26 USC Sec. 7323.

2. That the miscellaneous firearms listed in the complaint and admitted into evidence are the guns seized by Agents of the Bureau of Alcohol, Tobacco & Firearms from the residence and car of Lloyd K. Finfrock on July 27, 1971, and now claimed by him.

3. That Lloyd K. Finfrock was not a licensed dealer authorized to engage in the business of dealing in firearms under the provision of Chapter 44, Title 18, United States Code.

4. That within this District on or about December 22, 1970, Lloyd K. Finfrock sold a gun in the presence of an undercover agent of the Bureau of Alcohol, Tobacco &

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Firearms, and displayed and offered other guns for sale while in his automobile, and at this time advised of his concern about the transaction being discovered.

5. That on or about February 19 within this District Lloyd K. Finfrock discussed gun sales with an undercover agent of the Bureau of Alcohol, Tobacco & Firearms, at which time he admitted to the agent that he had recently bought and sold about ten guns for profit.

6. That on or about July 20, 1971, an undercover agent met and discussed with Lloyd K. Finfrock possible sales or purchases of his guns at which time Lloyd K. Finfrock showed and offered various guns for sale at various prices. No purchase was made. Three of the guns offered were "similar" to three guns in controversy, but none of the guns in this proceeding could be positively identified as the guns offered.

7. Included with the guns seized was an attache case, two .22 caliber riffles which Lloyd K. Finfrock testified were given to him when he was ten years of age, and two boxed target pistols he states he had for the purpose of a family gift and were all for personal use.

8. Lloyd K. Finfrock denies he was a dealer in guns and generally denies the offers and admissions set forth above.

9. The more credible evidence and the greater weight of the evidence supports the Government's position.

10. The specific statutory violations alleged in the complaint were indirectly amended by the Government's Bill of Particulars.

CONCLUSIONS OF LAW

1. Lloyd K. Finfrock was not in compliance with the requirements of Chapter 44, Title 18, USC in that he was

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engaged in the business of dealing in firearms without the required license. The statute does not prescribe a precise standard for this determination, but the evidence of one sale, the offers to sell, admissions of Lloyd K. Finfrock as to other sales for profit, and the other surrounding facts and circumstances adequately establish these findings and conclusions for the purposes of this civil proceeding. *U.S. v. Gross,* 451 F. 2d 1355 (7th Cir. 1971).

2. The guns, with the exception of the guns mentioned above as possessed since childhood and for family gifts, are forfeitable to the United States.

Therefore, it is hereby ordered that:

1. The guns, with the exception of the childhood guns and the guns held for a family gift, are hereby condemned and forfeited to the United States.

2. The guns held since childhood and for family gifts shall upon further identification by Lloyd K. Finfrock and as may be mutually agreed to between the parties, based upon the references to these guns by Lloyd K. Finfrock in the evidence during the trial of this cause, be returned to him together with the attache case.

3. The Government shall dispose of the guns forfeited in due course according to statute.

4. In the event this Memorandum Order and Opinion is appealed and while the Clerk of this Court has custody of the remaining guns, the seizing agency shall continue responsibility for the proper maintenance of said guns so that they may not deteriorate in value until this matter is finally determined. Lloyd K. Finfrock and his counsel shall upon notice to the United States Attorney be permitted reasonable opportunity to examine the guns to

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satisfy themselves as to the proper fulfillment of this maintenance requirement.

5. Leave is hereby granted to the Government to amend its complaint within three days to conform to the evidence in relation to the relevant sections of the U.S. Code involved.

Enter this 26th day of December, 1974.

|s| Harlington Wood
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Libellant, v. MISCELLANEOUS FIREARMS, Libellee.	S-Civ-74-83

ORDER

The Post Trial Motion combined in a brief in support thereof and the Government's Brief in Opposition have been considered together with the Memorandum Opinion and Order previously entered by this Court, and no hearing being required, the Court finds the Motion to be without merit and it is hereby denied.

Enter this 13th day of June, 1975.

|s| Harlington Wood
United States District Judge

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APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 7, 1976
February 3, 1976.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. JULIUS J. HOFFMAN, Senior District Judge*

No. 75-1687

UNITED STATES OF AMERICA, Libellant, vs. MISCELLANEOUS FIREARMS, Libellee, APPEAL OF LLOYD K. FINFROCK, Libellee.	Appeal from the United States District Court for the Southern District of Illinois No. (S-CIV-74-83) Harlington Wood, Jr. Judge

ORDER

A complaint for forfeiture of 23 firearms under 18 U.S.C. § 924(d), based on the violation of 18 U.S.C. § 922(a)(1),[1] was heard before the district court, which entered findings of fact on December 26, 1974 that (1) Lloyd K. Finfrock was not a licensed dealer in firearms; (2) on December

* Senior District Judge Julius J. Hoffman of the Northern District of Illinois is sitting by designation.

1. § 922(a)(1) provides that "[i]t shall be unlawful— . . . for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms."

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22, 1970, Finfrock sold a gun and displayed and offered other guns for sale while in his automobile; (3) on February 19, 1971, Finfrock discussed gun sales with an undercover government agent, admitting that he had recently bought and sold about 10 guns for profit; (4) on July 20, 1971, Finfrock discussed possible sales or purchases of guns and offered various guns for sale at various prices; and (5) included among the 23 guns seized were two .22 caliber rifles given to Finfrock when he was 10 years of age and two boxed target pistols which Finfrock had for the purpose of a family gift. The court ordered 19 of the firearms, excluding the four which were family gifts, condemned and forfeited to the United States under 26 U.S.C. § 5872(b).

Finfrock appealed urging four grounds for reversal. We affirm.

Finfrock's first argument was inadequacy of the evidence. The record includes an exemplified certification that Finfrock is not a licensed firearm dealer. He does not dispute this fact but contends that he is merely a gun collector and not a dealer. Two special agents of the Bureau of Alcohol, Tobacco and Firearms testified that (1) Finfrock sold one gun and offered to sell four others on December 22, 1970; (2) Finfrock offered to sell four guns on February 19, 1971, during which time he said "he obtained ten .25 caliber pistols from a dealer in Decatur, Illinois, and he said he was able to sell those for a pretty good buck"; and (3) Finfrock offered to sell five guns on July 20, 1971. This is sufficient evidence to establish Finfrock as a dealer rather than a mere collector. *United States v. Gross,* 451 F. 2d 1355, 1357-1358 (7th Cir. 1971); *United States v. Zeidman,* 444 F. 2d 1051, 1054-1055 (7th Cir. 1971). Fourteen of the firearms involved in this case were seized from Finfrock's residence and

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nine were seized from his automobile. Finfrock testified that he hid various guns around his apartment to protect against their theft but he did not explain why he kept so many guns in his automobile where they would be particularly vulnerable to theft.

Finfrock's second argument was that the Gun Control Act of 1968 is unconstitutionally vague as applied to him. We disposed of this argument under similar factual circumstances in *United States v. Gross,* 451 F. 2d 1355, 1357-1358 (7th Cir. 1971).

Finfrock next argued that the seized weapons had a value of $10,000 whereas 18 U.S.C. § 924(a) provides for a maximum fine of $5,000. The forfeiture here was based upon § 924(d), which does not place any dollar limit on forfeitures.

Finally, Finfrock argued that the dismissal of an earlier indictment against him barred the government from proceeding upon the forfeiture. Here there was no acquittal on the criminal charge but even "acquittal on the criminal charge did not necessarily resolve the issues in the forfeiture action." *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 234 (1972). "Such acquittal on such criminal charge is not a bar to the civil administrative action by the government, which is remedial in nature, arising out of the same facts on which the criminal proceeding was based." *Epps v. Bureau of Alcohol, Tobacco & Firearms,* 375 F. Supp. 345 (E.D. Tenn. 1973), citing *Helvering v. Mitchell,* 303 U.S. 391, 397 (1938).

Judgment of forfeiture is affiffirmed.

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APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 27, 1976
Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. JULIUS J. HOFFMAN, Senior District Judge*

No. 75-1687

UNITED STATES OF AMERICA, Libellant, vs. MISCELLANEOUS FIREARMS, Libellee, APPEAL OF LLOYD K. FNIFROCK, Libellee.	Appeal from the United States District Court for the Southern District of Illinois No. (S-CIV-74-83) Harlington Wood, Jr. Judge

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing.

IT IS ORDERED that the petition for rehearing in the above-entitled cause be, and the same is hereby, DENIED.

* Senior District Judge Julius J. Hoffman of the Northern District of Illinois is sitting by designation.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1389

LLOYD K. FINFROCK AND MISCELLANEOUS FIREARMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support an order of forfeiture and that whenever the government dismisses an indictment under the Gun Control Act for unlawful dealing in firearms it is collaterally estopped from bringing a civil forfeiture action against any of the firearms involved.

After a forfeiture proceeding in the United States District Court for the Southern District of Illinois, petitioner was ordered to forfeit 19 firearms pursuant to Section 924(d) of the Gun Control Act of 1968, 18 U.S.C. 924(d) (Pet. App. A).[1] The court of appeals affirmed (Pet. App. C).

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[1]Section 924(d) provides in pertinent part:

> Any firearm * * * involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder * * * shall be subject to seizure and forfeiture * * *.

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On July 24, 1971, agents of the Bureau of Alcohol, Tobacco and Firearms (ATF), acting pursuant to a search warrant, seized 23 firearms from petitioner's residence and car. An indictment was returned on August 14, 1971, charging petitioner with various weapons violations, including dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1). On June 17, 1974, the United States Attorney obtained leave of court under Rule 48(a), Fed. R. Crim. P.,[2] and dismissed the indictment. The forfeiture action was commenced on July 9, 1974.

The government's evidence adduced at the forfeiture hearing showed that on December 22, 1970, AFT Agent Borcia, acting in an undercover role, and an informant, Ron Backer, met with petitioner at a restaurant in Lincoln, Illinois (Tr. 8, 48). The men went outside to examine a weapon petitioner had agreed to sell to Backer, but petitioner "said he didn't want do any dealing in the parking lot of [the] restaurant because the State Police hang out there a lot" (Tr. 9). At a shopping center close by, petitioner sold Backer a 1971 model luger pistol for $375 (Tr. 10, 27). Petitioner also displayed and offered several other guns for sale and showed a loaded luger which he had hidden under the front seat of his car (Tr. 9-10, 22).

During the afternoon of February 19, 1971, Agent Borcia and informant Backer again met with petitioner, in petitioner's apartment, where they discussed the possible sale of several firearms (Tr. 11, 30-31). Agent Borcia told petitioner that he was not interested in

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[2]Rule 48(a) provides, in pertinent part, that "the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate."

spending as much money as petitioner was asking for the firearms under discussion, and petitioner replied that, although he did not have such a weapon at that time, he could obtain a Walther PPK which he would sell to Borcia for one hundred dollars (Tr. 11). Petitioner also told Borcia that he had recently bought and sold ten guns for profit (Tr. 11-12).

On July 20, 1971, at another meeting in petitioner's apartment, attended by ATF Agent Krug, petitioner, Backer, and a friend of petitioner's (Tr. 36-37), petitioner again showed and offered various guns for sale at various prices (Tr. 37-38). In particular, he offered to sell Agent Krug a Walther PPK for $130 and a Browning 9 millimeter pistol for $115. No purchases were made, but Agent Krug told petitioner that he would return on the following Saturday to buy one of the guns (Tr. 39). In fact on that Saturday 23 weapons petitioner kept in his apartment and automobile were seized.

Petitioner testified that he was a gun collector, not a dealer, and that he kept his guns hidden in various parts of his apartment because he feared that they might be stolen (Tr. 90-132).[3] In closing argument petitioner's counsel suggested that the discussion of prices in connection with various weapons displayed by petitioner to the agents amounted to no more than petitioner's boastfulness about the value of his collection (Tr. 145).

1. The district court's determination that petitioner was an unlicensed "dealer in firearms" under 18 U.S.C. 922 (a)(1)[4] was clearly supported by a preponderance of the

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[3]As the court of appeals noted (Pet. App. C3), petitioner "did not explain why he kept so many guns in his automobile where they would be particularly vulnerable to theft."

[4]That provision declares it to be unlawful "for any person, except a licensed * * * dealer, to engage in the business of * * * dealing in firearms."

evidence. As the court of appeals observed (Pet. App. C2-C3):

> The record includes an exemplified certification that [petitioner] is not a licensed firearms dealer. He does not dispute this fact but contends that he is merely a gun collector and not a dealer. Two special agents of the Bureau of Alcohol, Tobacco and Firearms testified that (1) [petitioner] sold one gun and offered to sell four others on December 22, 1970; (2) [petitioner] offered to sell four guns on February 19, 1971, during which time he said "he obtained ten .25 caliber pistols from a dealer in Decatur, Illinois, and he said he was able to sell those for a pretty good buck"; and (3) [petitioner] offered to sell five guns on July 20, 1971. This is sufficient evidence to establish [petitioner] as a dealer rather than a mere collector. *United States* v. *Gross*, 451 F.2d 1355, 1357-1358 (7th Cir. 1971); *United States* v. *Zeidman*, 444 F.2d 1051, 1054-1055 (7th Cir. 1971).

The cases contruing Section 922(a)(1) refute petitioner's argument (Pet. 12-13) that to establish that he was a "dealer" the government must prove that he made several sales and profited from them. For example, *United States* v. *Gross*, 451 F.2d 1355 (C.A. 9), rejected the claim that dealing in firearms must be one's primary business, and did not hold that proof that the defendant actually made money from the sale of firearms was necessary to a conviction; *United States* v. *Wilkening*, 485 F.2d 234, 235 (C.A. 8), held that the government need not show that the defendant profited from his dealing; and *United States* v. *Powell*, 513 F.2d 1249, 1250 (C.A. 8), upheld a conviction under Section 922(a)(1) notwithstanding the absence of actual profit, ruling that the evidence was sufficient to support a reason-

able inference that the defendant did or sought to make a profit. Accord, *United States* v. *Swinton*, 521 F.2d 1255 (C.A. 10), certiorari denied, February 23, 1976 (No. 75-5717). Even if the single sale testified to by the agents might not have been enough, standing alone, to establish a violation of Section 922(a)(1), that transaction, plus the other evidence of petitioner's past (profitable) sales and willingness to engage in future sales, was sufficient to show that petitioner was "engaged in the business of * * * dealing." See, *e.g.*, *Kaneshiro* v. *United States*, 445 F.2d 1266, 1269 (C.A. 9); *Bush* v. *United States*, 218 F.2d 223, 224 (C.A. 10).

2. Petitioner having been found to have been dealing in firearms without a license, the firearms "involved in or used or intended to be used" in such unlawful activity were accordingly subject to forfeiture under Section 924(d). Petitioner argues that the forfeiture order must be reversed because the undercover agents did not record the serial numbers of the firearms they observed petitioner display in his apartment and his automobile and were therefore unable to say that those firearms were identical to the firearms seized and forfeited. The agents testified, however, that among the weapons petitioner offered to sell were a Walther PPK pistol, a Browning 9 millimeter pistol, and another pistol in a leather holster (Tr. 38, 51-52); such weapons were included among those seized and forfeited (Tr. 38-39). The agents also testified that a group of the seized firearms were contained in a briefcase that looked like the briefcase from which petitioner displayed firearms for sale, and that some of the seized weapons were wrapped in socks, just as weapons offered for sale by petitioner had been (Tr. 40). This testimony, none of it challenged by petitioner, and the reasonable inferences to be drawn from it, justified the district court in concluding that the government had

proved by a preponderance of the evidence that the seized firearms were firearms "involved in or used or intended to be used" in petitioner's unlawful dealing.[5]

3. Petitioner's last argument is that the government's dismissal of the indictment charging violation of the Gun Control Act collaterally estops the government from bringing a forfeiture action arising out of the same circumstances.

Principles of collateral estoppel preclude repetitive litigation of issues already finally adjudicated; they have no application in the case of a voluntary, court-authorized dismissal by the government, which terminates the action prior to any adjudication and (as petitioner himself acknowledges, Pet. 14) permits recommencement of the very same action subject only to compliance with the relevant statute of limitations.

We agree with petitioner (Pet. 13) that a forfeiture under the Gun Control Act cannot occur absent proof of a violation of that statute. It does not follow, however, that such proof cannot be established except in a criminal case against petitioner himself. Here the district court expressly determined (Pet. App. A2-A3) that on the facts shown petitioner "was engaged in the business of dealing in firearms without the required license" and was therefore "not in compliance with" the Gun Control Act.

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[5] *Lowther* v. *United States*, 480 F.2d 1031 (C.A. 10), contrary to petitioner's claim (Pet. 9), is not in conflict. There the government destroyed firearms that, in light of their owner's acquittal on a criminal charge of unlawful possession, were determined to have been innocently possessed and were not contraband. The government's taking was thus unconnected to any violation of law and the owner was held entitled to a remedy under the Tucker Act. The instant case is different because the district court in the forfeiture proceeding found that petitioner had indeed been engaged in precisely that unlawful activity which warrants forfeiture of the firearms involved.

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To be sure, this determination was made pursuant to the less rigorous burden of proof imposed upon the government in civil as compared to criminal cases, but this Court has not only approvingly recognized this difference but also, in the context of a forfeiture case following an *acquittal* of the libellee on the underlying substantive offense, ruled that the different standards of proof "precludes application of the doctrine of collateral estoppel." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235. If "acquittal on the criminal charge [would] not necessarily resolve the issues in the forfeiture action" (*id.* at 234), then surely a voluntary dismissal of the criminal charge would not.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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